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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of

Review of the Commission's  
Regulations Governing Broadcast  
Television Advertising

MM Docket No. 95-90

**NOTICE OF PROPOSED RULE MAKING**

Adopted: June 14, 1995;

Released: June 14, 1995

Comment Date: August 28, 1995

Reply Comment Date: September 27, 1995

By the Commission:

**I. INTRODUCTION**

1. With this Notice of Proposed Rule Making (NPRM), the Commission continues its reexamination of the rules regulating broadcast television network/affiliate relationships in light of changes in the video marketplace.<sup>1</sup> This NPRM takes a fresh look at Sections 73.658(h) and (i) of the Commission's Rules (the "network control of station advertising rates" rule and the "network advertising representation" rule, respectively). Section

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<sup>1</sup> The Commission is currently examining or has recently completed a review of a number of other network rules. See, e.g., Notice of Proposed Rule Making in MM Docket No. 95-40, FCC 95-145 (released April 5, 1995) (reexamination of rule requiring filing of affiliation contracts) (Filing of Affiliation Contracts NPRM); Report and Order in MM Docket No. 91-221, FCC 95-97 (released March 7, 1995) (repeal of the network station ownership rule and the secondary affiliation rule); Notice of Proposed Rule Making in MM Docket 94-123, FCC 94-266 (released October 25, 1994) (reexamination of the prime time access rule).

73.658(h) prohibits agreements by which a network can influence or control the rates its affiliates set for the sale of their non-network broadcast time, and Section 73.658(i) of the Commission's Rules prohibits broadcast television affiliates that are not owned by their networks from being represented by their networks for the sale of non-network advertising time. Both rules address station relationships with any broadcast television network, *i.e.*, any organization that provides an identical program to be broadcast simultaneously by two or more stations.<sup>2</sup> This is the broadest definition of "network" used in any of the Commission's rules.<sup>3</sup>

2. In reconsidering these rules, our central focus is on whether they continue to effectively serve this Commission's cornerstone interests of promoting diversity and competition. In this NPRM, after first reviewing the initial premises for these rules, we will look at the changes in the competitive environment over the years since the rules were adopted, and we will consider the current marketplace in which they operate. We will inquire whether networks would have the capability and the incentive to exercise undue market or bargaining power in the absence of these rules and will examine public interest concerns any such capability and incentive would raise. We also ask whether the rules as currently formulated achieve their intended purpose or if they are readily circumvented. We will consider as well the costs these rules may impose, and we will ask commenters to weigh these costs against the potential public interest benefits.

## II. BACKGROUND

### A. How Advertisers Purchase Television Time.

3. To examine the impact of these rules on the industry, their intended role in protecting the public interest, and their effectiveness, it is important to review how advertisers purchase advertising time on broadcast television. A distinction exists between the national and the local television advertising markets, based on the location of the consumers that the

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<sup>2</sup> Report on Chain Broadcasting, Commission Order No. 37; Docket 5060, at 77, 105 (May, 1941) (in which the Commission stated that the rules apply to regional networks, citing networks with as few as two affiliates, modified, Supplemental Report on Chain Broadcasting (October, 1941), appeal dismissed sub nom. NBC v. United States, 47 F. Supp. 940 (1942), aff'd, 319 U.S. 190 (1943). This is the definition of network broadcasting set forth in Section 3(p) of the Communications Act of 1934, as amended, 47 U.S.C. § 153 (p).

<sup>3</sup> This definition applies to the new United Paramount Network and Warner Brothers Network, as well as the more established ABC, CBS, NBC and Fox networks.

purchaser of the advertising time intends to reach.<sup>4</sup> Some companies (local advertisers) serve a geographically limited, or local, market and therefore wish to purchase advertising that reaches only local consumers. In contrast, other companies (national advertisers) compete in much larger geographic markets, and consequently seek to reach consumers nationwide.

4. Television networks sell time to national advertisers. These "network advertisements" air during network programming. Broadcast television stations also sell time to national advertisers. These "national spot advertisements" are typically sold through a station's national advertising representative, to air locally either during non-network programming, or during those periods of time within network programming that are devoted to advertising use by the affiliate. Some advertisers may choose to purchase national spots to air messages that complement and reinforce their network advertisements in selected markets, while others may wish to air messages targeted to specific regions as a substitute for a broadly targeted network advertisement. National advertisers can also purchase television advertising time from nonbroadcast outlets and networks, such as cable system operators and cable networks.

B. The Network Control of Station Advertising Rates Rule.

5. The Commission initially adopted the proscription against network control of affiliate advertising rates in the radio service, in its 1941 Report on Chain Broadcasting.<sup>5</sup> In analyzing the radio broadcasting industry, the Commission found that affiliates were increasingly able to compete against their own networks for national advertisers. It also noted that NBC was negotiating affiliation agreements restricting a licensee's ability to charge a national spot advertising rate lower than the network advertising rate. In deciding to protect licensees from advertising rate limitations imposed by the networks, the Commission reasoned that the removal of such artificial restraints on affiliates' ability to attract and sell time to advertisers would enable affiliates to operate more economically and profitably. In turn, it predicted that the rule would serve the Commission's goal of "[c]ontinuing and unrestricted competition between network and outlet for [national

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<sup>4</sup> See Further Notice of Proposed Rule Making in MM Docket No. 91-221, 10 FCC Rcd 3524, 3541-44 (TV Ownership FNPRM) and Bruce M. Owen and Steven S. Wildman, Video Economics, (Harvard University Press, 1992) at 11 for further discussions of this distinction in the television advertising market.

<sup>5</sup> Report on Chain Broadcasting at 73-75. The Commission also inaugurated several other radio network rules in the Order associated with this document.

advertising, which] will provide the public with steadily improving program service."<sup>6</sup> The Commission applied the rule to television broadcasting in 1946.<sup>7</sup>

6. In initially adopting the rule, the Commission was concerned with, among other things, the relationship between networks and their affiliates during the periods of greatest potential competition between them: commercial time sold during network programming. It proscribed any agreement that "ha[d] the effect of decreasing [the affiliate's] ability to compete for national business."<sup>8</sup> In addressing the Commission's concerns, the rule applies to any broadcast time not being used by the network, and therefore includes non-network advertising within network programming.

7. Several years later, the Commission appointed a staff committee to conduct a general inquiry into television network broadcasting, culminating in the 1957 Barrow Report.<sup>9</sup> Based on the contemporary practices in and the general state of the television industry at that time, the Barrow Report concluded that this particular rule remained necessary, and it recommended maintaining the prohibition, and the Commission followed this recommendation. In 1980, the Commission again created a staff study group to examine the effectiveness of the existing network/affiliate regulations, although the Commission never formally acted on its staff's findings. Like the Barrow Report, the staff's Network Inquiry Report<sup>10</sup> concluded that elimination of the rule would harm competition between networks and affiliates. It reasoned that a network would be motivated to determine the prices for both network and national spot advertising if, by so doing, that network could then reduce competition with its affiliates for national advertisers and, consequently, earn greater profits. Unlike prior Commission deliberations or other staff reports, the Network Inquiry Report also expressed concern over the effect of such activity on the advertisers themselves. In so

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<sup>6</sup> Id. at 73.

<sup>7</sup> Rules Governing Television Broadcast Stations, 11 Fed. Reg. 33, 37 (January 1, 1946). 47 C.F.R. § 73.658(h), the network advertising rule as applied to television, states that "[n]o license shall be granted to a television broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs."

<sup>8</sup> Report on Chain Broadcasting at 75.

<sup>9</sup> Network Broadcasting, Report of the Network Study Staff to the Network Study Committee (Oct. 1957), reprinted in Report of the House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 1297, 85th Congress, 2nd Sess. (1958) (the Barrow Report).

<sup>10</sup> Network Inquiry Special Staff, New Television Networks: Entry, Jurisdiction, Ownership and Regulation, Final Report, (October 1980) (Network Inquiry Report).

doing, it asserted that setting both network and national spot advertising prices would amount to price fixing.<sup>11</sup>

C. The Network Advertising Representation Rule.

8. The Commission adopted the network advertising representation rule<sup>12</sup> in 1959, pursuant to the recommendation of the Barrow Report.<sup>13</sup> Central to the Commission's analysis was its observation that network sales and station spot sales were at that time the only competing modes of national television advertising.<sup>14</sup> It reasoned that a network representing an affiliate for national advertising sales might have the incentive to increase the price of national spot advertisements to an artificially high level, in order to gain an advantage in pricing network advertising, whereas an affiliate not represented by the network would be free to compete against the network for national advertising by setting spot rates that have been determined solely by market conditions. Accordingly, the Commission concluded that when a network serves as the advertising agent for both itself and its affiliate, it plays two roles that inherently conflict with each other.<sup>15</sup> Further, the Commission noted that because network affiliation was often essential to a station's economic well-being, it was possible for a network to pressure an affiliate into a representation agreement, either directly or indirectly.<sup>16</sup>

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<sup>11</sup> Id. at 492-93.

<sup>12</sup> 47 C.F.R. § 73.658(i) states that "[n]o license shall be granted to a television broadcast station which is represented for the sale of non-network time by a network organization or by an organization directly or indirectly controlled by a network organization, if the station has any contract, arrangement or understanding, expressed or implied, which provides for the affiliation of the station with such network organization: *Provided, however*, that this rule shall not be applicable to stations licensed to a network organization or to a subsidiary of a network organization."

<sup>13</sup> Report and Order in Docket No. 12746, 27 FCC 697, 714-15 (1959) (Network Spot Sales Report and Order), recon. denied, 28 FCC 447 (1960).

<sup>14</sup> Id. at 707; Barrow Report at 198.

<sup>15</sup> Network Spot Sales Report and Order at 714-19; Barrow Report at 536-39.

<sup>16</sup> Network Spot Sales Report and Order at 712-14; Barrow Report at 536. The Commission found no need to examine whether a similar rule should be applied to radio networks, opining that the relative significance of radio networks as an economic factor and a programming source in the radio broadcast industry had diminished significantly during the preceding years. Network Spot Sales Report and Order at 725-26.

9. Two decades later, in 1980, the staff's Network Inquiry Report recommended that the Commission consider repeal of the rule. It stated that, due to the networks' established contacts with most national advertisers and their extensive knowledge of their own programming, networks might be in a position to offer affiliates national spot representation at lower transaction costs than other representatives. If so, the staff concluded, the rule might be diminishing competition by keeping lower-cost advertising representatives out of various markets, to the detriment of both affiliates and advertisers.<sup>17</sup> This information also suggested that the networks' desire to represent affiliates might be motivated by factors unrelated to their competition in the national spot market, according to the staff. For instance, the Network Inquiry Report found that advertising representation would allow the network to acquire more information about the value of network and non-network programming to its affiliates.<sup>18</sup> Further, it concluded, such information could be valuable to a network in negotiations with its affiliates over compensation. In addition, a statistical analysis of the determinants of national spot advertising rates performed for the Network Inquiry Report found that in markets where a network owned, operated, and represented a station, national spot prices tended to be lower than in other markets, after accounting for the impact of other variables that affect advertising rates.<sup>19</sup> The Network Inquiry Report believed that this indicated that the benefits of joint representation to affiliates, networks, and advertisers were likely to outweigh any potential reduction in price competition, and that network representation was likely to be a less effective method of reducing price competition between networks and affiliates than direct control over both network and national spot rates.<sup>20</sup>

10. The Commission considered the Network Inquiry Report's recommendation to repeal the network representation rule in 1990 but ultimately declined to adopt it.<sup>21</sup> The Commission found that the "rule protects broadcast affiliates from the networks [sic] exerting influence over affiliate programming decisions, and [it] fosters competition in the local and national broadcast television markets."<sup>22</sup> The Commission acknowledged substantial changes in the television industry since 1959, and noted that it was conducting other proceedings in response to those changes. Citing the then-pending proceeding addressing the financial

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<sup>17</sup> Network Inquiry Report at 493-94.

<sup>18</sup> Id. at 493-94.

<sup>19</sup> Network Inquiry Special Staff Preliminary Report, The Market for Television Advertising, June 1980.

<sup>20</sup> Network Inquiry Report at 493-94.

<sup>21</sup> Report and Order in BC Docket No. 78-309, 5 FCC Rcd 7280 (1990) (1990 Network Representation Report and Order).

<sup>22</sup> Id. at 7281.

interest and syndication (fin-syn) rules,<sup>23</sup> the Commission expressed its concern that it not disrupt too many facets of the broadcast industry at one time.<sup>24</sup>

### III. DISCUSSION

11. Effects on the Public Interest. Our concern with affiliates' ability to compete effectively with networks in the sale of advertising time is grounded in the potential impact on the overall competitive position of local stations and, in turn, the stations' ability to present programming that best serves their communities. As the Commission stated in the Report on Chain Broadcasting, "[c]ompetition between stations in the same community inures to the public good because only by attracting and holding listeners can a broadcast station successfully compete for advertisers. Competition for advertisers[,] which means competition for listeners[,] necessarily results in rivalry between stations to broadcast programs calculated to attract and hold listeners, which necessarily results in the improvement of the quality of their program service. This is the essence of the American system of broadcasting."<sup>25</sup> The Commission still believes, fifty years later, that healthy and vigorously competitive television advertising markets are in the public interest.

12. This competition for advertisers also affects the independence of affiliates from the networks, with implications not only for competition, but also for the diversity of programming available to viewers on a national scale. We have already recognized that we should be concerned with diversity on a local basis, as it determines the variety of viewpoints available to an individual viewer.<sup>26</sup> However, as we stated in the TV Ownership FNPRM, "[d]iversity on the national level has been part and parcel of government concern since the inception of broadcast regulation. . . . While we are no longer concerned that a 'Radio Trust' will dominate broadcast communications, we still believe it essential to consider national ownership diversity, in large measure because of the resulting impact it has on diversity at the local level."<sup>27</sup> We believe that, as stations' financial strength lends them greater programming independence, it gives the public access to various broadcast viewpoints from a number of individual stations, despite their common network affiliation.

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<sup>23</sup> Notice of Proposed Rulemaking in MM Docket No. 90-162, 5 FCC Rcd 1815 (1990) (subsequent history excluded). The fin-syn rules in effect at that time were set forth in § 47 C.F.R. 73.658(j) and now are in Sections 73.659 - 73.662 of the Commission's Rules.

<sup>24</sup> 1990 Network Representation Report and Order at 7281.

<sup>25</sup> Report on Chain Broadcasting at 47, quoting Spartanburg Advertising Co., Docket No. 5451, (January 9, 1940).

<sup>26</sup> TV Ownership FNPRM at 3564-65.

<sup>27</sup> Id. at 3558-3559.

13. The network rules governing control of station rates and network advertising representation were originally adopted to protect the ability of affiliates to serve as viable, independent sources of programming, and to foster competition in the provision of national television advertising.<sup>28</sup> In concluding that these two rules were necessary and effective proscriptions to achieve these goals, the Commission made certain explicit determinations. First, the Commission concluded that networks and television stations competed against each other in the national television advertising market.<sup>29</sup> Second, because networks and television stations were at the time the only competitors in the national television advertising market, and because the overwhelming majority of television stations were network affiliates, the Commission concluded that networks possessed the incentive and ability profitably to raise network and national spot advertising prices above competitive levels.<sup>30</sup> In addition, the Network Inquiry Report concluded that, for the same reasons, networks and affiliates had an incentive to reach collusive agreements to raise network and national spot advertising prices above competitive levels.<sup>31</sup> In reaching its conclusions, the Commission implicitly assumed that the competition or rivalry among the existing networks was not sufficient to prevent any such collusion from harming competition in the television advertising market. We ask commenters to address whether these findings are accurate and relevant today.

14. Our statutory mandate requires us to "make available, as far as possible, to all people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service."<sup>32</sup> In carrying out this mandate, the Commission "plays a dynamic, proactive, and forward-looking role in regulating telecommunications."<sup>33</sup> In analyzing whether a particular rule serves the public interest, we are empowered by the Communications Act to take competition into account, and we do so.<sup>34</sup> Examination of

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<sup>28</sup> See Report on Chain Broadcasting at 73-75; Network Spot Sales Report and Order, passim.

<sup>29</sup> See Report on Chain Broadcasting at 73; Network Spot Sales Report and Order at 707.

<sup>30</sup> See Report on Chain Broadcasting at 30-31, 43-44; Network Spot Sales Report and Order at 707-08.

<sup>31</sup> Network Inquiry Report at 495.

<sup>32</sup> Section 1 of the Communications Act of 1934, as amended, 47 U.S.C. § 151.

<sup>33</sup> Third Report and Order in GN Docket No. 93-252, 9 FCC Rcd 7988, 8013 (1994) (Regulatory Treatment of Mobile Services).

<sup>34</sup> NBC v. United States, above. See also United States v. FCC, 652 F.2d 72, 81-82 (D.C. Cir. 1980) (en banc) (quoting Northern Natural Gas Co. v. FPC, 399 F.2d 953, 961 (D.C. Cir. 1968)); FCC v. RCA Comm., Inc., 346 U.S. 86, 94 (1952).



competition for the benefit of all users of communications services includes the effects on competition in commercial advertising.

15. In determining whether to retain the two network advertising rules, however, we must also balance the potential benefit of categorically barring potentially anticompetitive conduct against the costs of doing so. In assessing the benefits of a categorical bar, we must consider not only the potential harm to be prevented, but the likelihood that such harm will manifest itself and not be corrected through other means. In this respect, we seek comment on whether state and federal unfair trade and antitrust laws and enforcement mechanisms create a sufficient likelihood of detecting and remedying any anticompetitive conduct such that these rules have become more costly than beneficial. We also ask whether the actions that are prohibited by the rules may be sufficiently lacking in pro-competitive justification that it might be more efficient simply to prohibit such transactions entirely. In addressing these issues, commenters should discuss the specific costs that they believe may arise from enforcement of a per se prohibition.

16. Having discussed why network influence over national spot advertising rates implicates our public interest concerns, we turn to the practical questions of whether networks, under current market conditions, have the ability to exercise this influence, and whether they would choose to exercise it. The first question asks the degree to which a network could pressure its affiliates to act in a manner that benefits the network, but which may not be in the best interests of either the public or the licensee. The second question asks whether a network, even if it had such power, would have any incentive to exercise it. Finally, we request comment on whether the existing rules effectively perform their functions and whether elimination or modification of the rules would serve the public interest.

17. Bargaining Power. The public interest may be harmed if networks possess sufficient bargaining power over their affiliates such that exercise of this bargaining power would result in reductions of affiliate advertising revenues significant enough to inhibit the affiliates' ability to present programming that best serves its community. In 1941, the Commission concluded, on the basis of the Report on Chain Broadcasting, that affiliates' ability to provide programming to the public was jeopardized by the networks' exercise of undue bargaining power to require their affiliates to raise their national spot advertising rates so that national advertisers would purchase network, rather than affiliate, advertising time. In order to assess whether networks today have a substantial degree of bargaining power with respect to their affiliates, we must define the relevant alternatives available to the two parties. To the extent that an affiliate has alternative opportunities to affiliate with a given network, network bargaining power could be reduced. In the same manner, it is also presumed that the more potential affiliates in a market, the more bargaining power the network will have.

18. Affiliates have several alternatives to affiliating with a given network. They may choose to affiliate with one of the competing networks or to obtain programming in the syndication market. The more nearly equivalent to network affiliation these alternatives are in terms of benefits to the affiliate, the less power a network will be able to exercise over it.

In the same manner, networks possess alternatives to affiliating with a particular television station. A network may have a number of potential affiliates to choose from in a given market, or it may be able to purchase a station in the area. The more desirable these alternatives are, the more bargaining power a network will have.

19. We ask parties to comment on whether, and if so the extent to which, the balance of bargaining power has shifted toward affiliates in the years since these advertising rules were promulgated, and what effect the current balance of bargaining power has on our related public interest concerns of diversity and competition. A high number of recent affiliation switches appears to indicate that, in a number of markets, stations have affiliation options that confer on them some degree of increased bargaining power.<sup>35</sup> In light of today's changed video marketplace, is it reasonable to conclude that the networks' bargaining power remains sufficient to induce their affiliates to act in a manner otherwise contrary to their self-interest and that harms the public interest? We have sought comment on this issue in our recent Filing of Affiliation Contracts NPRM. In addition, several commenters have chosen to address network bargaining power over their affiliates in the prime time access rule (PTAR) proceeding, Notice of Proposed Rule Making in MM Docket No. 94-123, 9 FCC Rcd. 6328 (1994). We shall review the information submitted in those proceedings and consider that information in this proceeding.

20. Network Influence On Advertising Rates. Even if a network has undue bargaining power over its affiliates, it may not have the incentive or ability to exercise that bargaining power to influence national video advertising rates in a way that would harm the public interest. Presumably, a network would find it in its interest to manipulate the national spot advertising rates of its affiliates only if it could earn higher profits by doing so. Whether a network could profit from this activity depends on the availability of other sources of advertising time to which advertisers can turn that are "reasonably interchangeable" with network advertising time.<sup>36</sup> Understanding the goals of advertisers and the role of the national advertising representatives is critical in determining whether national spot advertisements are reasonably interchangeable substitutes for network advertisements. We must also consider whether there are products, in addition to national spot advertisements, that might substitute for broadcast television network advertising. If these other products provide competitive alternatives to network and national spot advertisements, the ability of a network to adversely influence rates in the national video advertising market will be substantially diminished. We invite comment on how properly to delineate the reasonably interchangeable substitutes to a network's advertising time and the extent to which these

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<sup>35</sup> See J. Zier, "Fog of War Engulfs Affiliation Battles," Broadcasting & Cable (December 5, 1994) at 50.

<sup>36</sup> The Supreme Court has stated that the relevant set of products to analyze in this regard is defined by which commodities are "reasonably interchangeable" by consumers. United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 394 (1956).

substitutes constrain a network's ability to profit by manipulating the national spot advertising rates of its affiliates.

21. In this regard, we propose to use the same analytical framework as set forth in our TV Ownership FNPRM.<sup>37</sup> In that item, we sought comment on whether the advertising time supplied by broadcast television networks, program syndicators, cable networks, and perhaps cable multiple system operators were reasonably interchangeable. We noted that the amounts of advertising time sold by other suppliers, such as direct broadcast satellite, wireless cable, or video dialtone program providers, were too small to have an appreciable effect on national broadcast advertising.<sup>38</sup> Appendix A provides information on advertiser expenditures on television advertising, in order to give a perspective on the relative expenditures on these various forms of television advertising. As can be seen, advertising expenditures on cable and syndicated programming have been steadily rising over the past ten years, indicating the integration of these forms of advertising into the marketing plans of American businesses.

22. As with network bargaining power, the importance of the national television networks in the television advertising market is also discussed by certain commenters in the PTAR proceeding. We will carefully review the comments filed on this issue in both the television ownership and PTAR proceedings. Subsequently, we will coordinate our examination of the record in this proceeding with our deliberations in those proceedings.

23. The Report on Chain Broadcasting argued that a network would exert pressure on its affiliates to raise their national spot ad rates so as to make network ads more attractive to advertisers, and thus more profitable.<sup>39</sup> In this way, the network's profits would increase at the expense of its affiliates' profits. The Network Inquiry Report argued that a network and its affiliates together had incentives to manipulate the network and national spot advertising rates so that all parties' profits increased.<sup>40</sup> Under either of these scenarios, if networks or networks and their affiliates together have the incentive and the market power to manipulate national video advertising rates to their advantage, the Commission's goals of diversity and competition could be adversely affected in the absence of the rules.

24. The ability of a network or a network and its affiliates to influence national video advertising rates depends again upon the availability of reasonably interchangeable substitutes. If we were to conclude on the basis of the record that each network's advertising time competes vigorously with: (1) the advertising time of the other networks; (2) the advertising time for national spot ads sold by affiliates and independent stations; and (3)

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<sup>37</sup> TV Ownership FNPRM at 3532-33.

<sup>38</sup> Id. at 3541-42.

<sup>39</sup> Report on Chain Broadcasting at 73-75.

<sup>40</sup> Network Inquiry Report at 492-493.

advertising time offered by syndicators and cable networks, then networks, either with or without their affiliates, will likely be unable to affect prices significantly in the national video advertising market. Under this scenario, if a network, or a network and its affiliates, were to attempt to raise their advertising rates above competitive levels, national advertisers would have several alternative suppliers to go to, and they would likely switch their patronage to these alternatives. We request comment on the ability of advertisers to switch to these alternative advertising providers and the resulting effect on station revenues. Commenters should focus on the degree to which these potential and actual competitors limit the ability of a network and/or its affiliates from profitably raising national television advertising rates above competitive levels.

25. Alternatively, if we were to conclude on the basis of the record that networks face few competitors in the national video advertising market other than each other and broadcast television stations (through national spot sales), we must still determine whether a network, or a network and its affiliates, could affect national television advertising rates in a manner that should concern us. Including only these competitors in the relevant market, we seek comment on whether any network, or a network and its affiliates acting in concert, could adversely affect national video advertising rates.

26. Finally, the record that we develop in this proceeding may indicate that network and national spot advertisements do not compete for the same advertisers. Should that be the case, changes in the rates for national spot advertisements will likely have no impact on the demand for network advertising and, consequently, no impact on network advertising rates. Such a finding would lead us to question the continued need for our advertising rules. We seek comment on what basis if any exists that would support retention of our advertising rules if we determine that network advertising time and national spot advertising time do not compete with each other for the same advertisers.

27. The role of the advertising representative firm. We also seek comment and information on the nature and extent of the services currently provided by national television advertising representatives. If general industry practice is for a television licensee to instruct the representative what rates to charge (leaving the latter no discretion to alter them), we question what harm there would be in allowing networks to represent their affiliates. On the other hand, licensees might generally provide their representatives a range of rates within which to charge advertisers, thereby giving the representatives some latitude in managing the stations' transactions. We ask whether this would facilitate the adverse consequences in the national television advertising market and the resulting public interest concerns that were previously discussed. Specifically, we ask for information on the degree to which stations provide their representatives with discretion in the rates they charge advertisers and to what extent advertising representatives are able to influence stations' rates. In this regard, we also seek comment on whether it would be reasonable to expect that a network, acting as an advertising sales representative for its independently owned affiliate, would behave in a manner similar to an independent advertising representative. We also ask what role network bargaining power would play in allowing networks to influence affiliate advertising policies

to the detriment of affiliates, advertisers, or the public interest. Would the network exercise any undue power it might possess? How might such conduct manifest itself?

28. We also note that the Network Inquiry Report asserted that, due to the networks' established contacts with most national advertisers and their extensive knowledge of their own programming, networks may be in a position to offer affiliates national spot representation at lower transaction costs than other representatives.<sup>41</sup> The Network Inquiry Special Staff released a study that found that national spot advertising rates were lower, after accounting for the impact of other economic factors, in markets containing network-owned, -operated, and -represented affiliates than in markets consisting entirely of independently owned affiliates.<sup>42</sup> The Network Inquiry Report concluded that this result was consistent with two hypotheses: either (1) network representation has no effect on market power; or (2) the consequent cost reductions are sufficiently great that, even if the network's market power is enhanced, it would still charge a lower price than it would absent such representation. Consequently, we solicit information on the comparative advantages of independent versus network representation in advertising markets. Further, we also seek comment on whether it would be reasonable to expect that a network, acting as an advertising sales representative, would treat its independently owned affiliates the same as its owned and operated television stations. We also ask commenters to suggest criteria we should use in balancing the potential adverse consequences of network representation on those public interest matters of concern to us against the potential benefits.

29. In 1969, the Commission prohibited representation of a television station by a sales representative commonly owned with a licensee of another, competing station in the same area (the Golden West policy).<sup>43</sup> The policy rested on the assumption that the sales representative had sufficient influence over the station's finances to reduce a station's competitive abilities and to restrict the diversification of program and service viewpoints. However, in 1981 the Commission determined that there was no longer any need for much of the Golden West policy.<sup>44</sup> The Commission determined that competing broadcast stations could be represented by the same advertising sales agency, stating that a sales representation firm had an economic interest in providing the best possible representation for each station, because it would otherwise lose its clients' business. Eight years later, the Commission extended this partial repeal of the Golden West policy to incorporate those advertising firms

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<sup>41</sup> Network Inquiry Report at 493.

<sup>42</sup> The Market for Television Advertising, June 1980, at 50-51.

<sup>43</sup> Golden West Broadcasters, 16 FCC 2d 918 (1969).

<sup>44</sup> Report and Order in BC Docket No. 80-438, 87 FCC 2d 668 (1981) (Golden West Elimination).

that act as sales representatives.<sup>45</sup> The Commission determined that the growth in the number of media outlets at both the national and local level "undercut[s] the notion that any single entity is capable of manipulating or otherwise skewing competition . . . in the economic marketplace."<sup>46</sup> In each case, the Commission's concerns were further reduced by the presence of "federal and state antitrust laws, which may be available to reduce or deter potential anticompetitive consequences."<sup>47</sup> We seek comment on the relevance of our repeal of the Golden West policy to our analysis of the network advertising representation rule.

30. Effectiveness of the Rules. Finally, we must address the question of whether our rules effectively prevent the harms they were designed to redress. Can networks currently influence national spot advertising rates indirectly, by using mechanisms other than possible influence or control over affiliates' rates? For example, since a network currently can control the amount of national spot time its affiliates have available to sell during network programming, does this allow the network indirectly to control the affiliates' national spot rates? As another example, networks can purchase a local broadcast station rather than affiliate with an independently-owned station, as we have previously mentioned. Thus, an increase in the number of stations owned by the network would seem to increase its influence in the national spot advertising market. We have proposed to authorize group ownership of stations serving up to 50% of the aggregate national audience in the TV Ownership FNPRM.<sup>48</sup> Commenters are requested to address these issues, to suggest any other ways that networks might circumvent the rules and adversely affect the public interest, and to suggest any modifications to our rules that would be appropriate to resolve these concerns. We ask commenters to provide any evidence that networks are using any of these means to manipulate national television advertising rates. If we find that networks, with or without their affiliates, can easily circumvent the advertising rules, then eliminating those rules would appear to cause no additional harm.

#### IV. PROPOSALS

31. Whether we repeal, modify, or retain the prohibitions on network control of station advertising rates and network representation of affiliates in the advertising market depends on the nature of the competitive advertising interrelationships among the various video program providers. Should the record indicate that neither television broadcast networks nor networks and their affiliates have the ability or incentive to manipulate the market price for network or

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<sup>45</sup> Policy Statement in MM Docket No. 87-154, 4 FCC Rcd 2208 (1989) (Cross-Interest Policy Statement).

<sup>46</sup> Id. at 2211.

<sup>47</sup> Id. at 2213.

<sup>48</sup> TV Ownership FNPRM at 3566-69.

national spot television advertising time, we would consider eliminating or modifying the rules. In addition, we would consider eliminating or modifying the rules if the record indicates that they are ineffective in correcting the public interest harm they were designed to remedy. On the other hand, should we determine that networks, or networks and their affiliates, have the ability and incentive to manipulate the market price for network or national spot television advertising time, and that these rules effectively address any resulting public interest harm, we would consider retaining the rules.

32. However, the record might indicate that we should eliminate one rule, but not the other. For example, we might determine on the basis of the record established that networks, acting as station advertising representatives, in fact have no influence over national spot rates of the stations they represent. If these representatives have no ability to affect their clients' rates, we would likely be inclined to eliminate the rule prohibiting network representation of affiliates in the national spot advertising market, even though we may wish to retain the rule prohibiting network control of station advertising rates. We ask for comment on the circumstances under which it might be appropriate to repeal one rule but retain the other.

## V. ADMINISTRATIVE MATTERS

33. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before **August 28, 1995**, and reply comments on or before **September 27, 1995**. To file formally in this proceeding, you must file an original plus four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C. 20554.

34. This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission Rules. See generally 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

35. Additional Information: For additional information on this proceeding, contact Paul Gordon (202-776-1653) or Tracy Waldon (202-739-0770), Mass Media Bureau.

## VI. INITIAL REGULATORY FLEXIBILITY ANALYSIS

36. Reason for the Action: This proceeding was initiated to review and update the Commission's Rules concerning network control of station advertising rates and affiliate advertising representation by networks in light of changes in the video programming industry.

37. Objective of this Action: This Notice is intended to reexamine the Commission's rules regulating broadcast television stations' sale of advertising.

38. Legal Basis: Authority for the actions proposed in this Notice may be found in Sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154 and 303.

39. Recording, Recordkeeping, and Other Compliance Requirements Inherent in the Proposed Rule: None

40. Federal Rules that Overlap, Duplicate, or Conflict with the Proposed Rules: None.

41. Description, Potential Impact, and Number of Small Entities Involved: Approximately 1,500 existing television broadcasters of all sizes may be affected by the proposals contained in this decision.

42. Any Significant Alternatives Minimizing the Impact on Small Entities and Consistent with the Stated Objectives: The proposals contained in this NPRM are intended to simplify and ease the regulatory burden currently placed on commercial television broadcasters.

43. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared the above Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of this Notice of Proposed Rule Making, but they must have a separate and distinct heading designating them as responses to IRFA. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 et seq. (1981).



44. This Notice of Proposed Rule Making is issued pursuant to authority contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303.

FEDERAL COMMUNICATIONS COMMISSION

*William F. Caton*  
William F. Caton  
Acting Secretary

**Appendix A: Advertiser Expenditures on Television Advertising for Selected Years  
from 1968 to 1993 (In Millions of Dollars)**

Year	National				Local		Total	
	Netwk	Synd	Spot	Cable	Spot	Cable	TV	Cable
1968	1,523		1,131		577		3,231	
1973	1,968		1,377		1,115		4,460	
1978	3,975		2,607		2,373		8,955	
1983	6,955	300	4,827	282	4,345	50	16,427	332
1988	9,172	901	7,147	942	7,270	254	24,490	1,196
1993	10,209*	1,576*	7,800	1,970	8,435	594	28,020	2,564

\* In 1993 Fox is included in the TV Networks total. Prior to that time, it was included in the Syndication total. Hence, Syndication and Network TV data from this year are not comparable to those for prior years.

Source: Prepared for Advertising Age by Robert J. Coen, McCann-Erickson.